**OYL CONDAIR INDUSTRIES SDN. BHD.**

**v.**

**RAZUAN BIN ARSHAD & 127 ORS.**

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[CIVIL APPEAL NO. 16-1-92]
8 MARCH 1993

***INDUSTRIAL LAW: Collective agreement - Allowances payable under original contract of service not incorporated in collective agreement - Allowances withdrawn after implementation of collective agreement - Whether allowances continue to be payable - Whether terms of collective agreement supersede terms of original contract of service.***

The appellants and the Electrical Industry Workers Union, on behalf of the respondents, concluded a collective agreement which was taken cognisance of by the Industrial Court. The collective agreement did not provide for the payment of special relief allowance (SRA) and incentive allowance (IA) which was provided for under the original contract of service between the employees and the appellant company.

Upon implementation of the collective agreement, the appellant ceased payment of SRA and IA to the employees. The respondent employees of the appellant being unhappy with the stoppage of these allowances filed a complaint with the Labour Officer pursuant to s. 69 of the Employment Act 1955.

The respondents argued that it was legally wrong for the appellant to stop the payments of SRA and IA upon the implementation of the collective agreement because the provisions pertaining to the SRA and the IA as provided for under the original contract of service between the employees and the appellant continued to be in force notwithstanding the collective agreement.

The appellant argued that since the collective agreement did not provide for SRA and IA, therefore, by virtue of s. 17(2) of the Industrial Relations Act 1967 (the Act), these allowances were deemed to have been abolished. The Labour Officer found in favour of the respondents and the appellant appealed.

**Held:**

**[1]** The provisions of the original contract of service relating to SRA and IA are provisions governing conditions of employment. The effect of s. 17(2) of the Act and Article 13(b) of the collective agreement requires the provisions of the contract of service pertaining to conditions of employment to conform with the provisions of the collective agreement pertaining to the same matters.

**[2]** The provisions relating to SRA and IA in the original contract of service and the provisions relating to conditions of employment in the collective agreement are in conflict. Therefore as stipulated by Article 13(a) of the collective agreement parties to the original contract of service must regard the provisions in the original contract of service relating to SRA and IA as having been superseded by the provisions relating to conditions of employment in the collective agreement.

**[3]** The mere act of the appellant in continuing to pay SRA and IA after the date of cognisance of the collective agreement by the Industrial Court could not be described as evidence of a subsequent collective agreement which satisfied all the requirements of Part IV of the Act as well as Article 2(b),(c) and (d) of the collective agreement. The payments made were nothing more than mere gratuitous payments.

*[Appeal allowed with costs. Order of Labour Officer set aside].*

**Legislation referred to:**
Employment Act 1955 (Act 265) s. 69
Industrial Relations Act 1967 (Act 177) ss. 16, 17(2)

*For the appellant - K. Nadarajah*
*For the respondent - D. Kalai (B. Thangaraj with him)*

**JUDGMENT**

**Mohd Hishamudin Bin Mohd. Yunus JC:**
On 23 December 1987, the Electrical Industry Workers Union concluded a collective agreement (hereinafter referred to as "CA") with the appellant. The CA was made in accordance with Part IV of the Industrial Relations Act 1967 (Act 177( (hereinafter referred to as "IRA"). It is provided in Article 2(a) of the CA that the agreement shall come into force with effect from 1 September 1987. Pursuant to s. 16 of the Industrial Relations Act, a copy of the agreement was deposited with the Industrial Court and the Court took cognizance of the agreement on 13 January 1988. The agreement was implemented on 1 March 1988.

Under the original contract of service between the employees (members of the Union) and the appellant company, the employees were entitled to special relief allowance (hereinafter referred to as "SRA") and incentive allowance (hereinafter referred to as "IA") However, the CA is silent on these allowances. Nevertheless, after the CA was signed (on 23 December 1987), the appellant company continued paying the SRA and the IA. But when the CA was implemented (on 1 March 1988), the appellant company stopped such payments.

The respondents in this case - Encik Razuan bin Arshad and 127 others - all of whom were employees to the appellant company (and were also members of the Union), were unhappy with the stoppage of these allowances. They filed a complaint before the Labour Officer, Port Klang, pursuant to s. 69 of the Employment Act 1955 (Act 265). Before the Labour Officer, the respondents argued that legally it was wrong for the appellant to stop the payments of the SRA and the IA upon the implementation of the CA because the provisions pertaining to the SRA and the IA as provided for under the original contract of service between the employees and the appellant continued to be in force notwithstanding the CA.

The appellant, on the other hand, argued that since the CA did not provide for SRA and IA, therefore, by virtue of s. 17(2) of the Industrial Relations Act, these allowances were deemed to have been abolished. The fact that the appellant had continued paying these allowances after signing the CA on 23 December had no significance whatsoever.

The Labour Officer made an order in favour of the respondents. He gave two reasons for his decision. First, he said that if it was the intention of the parties that the SRA and the IA should cease to be payable upon the coming into force of the CA then the appellant should have immediately stopped paying these allowances after 31 December 1987 (since the signing by both parties was done on 23 December 1987) or latest after 31 January 1988 (since the agreement was taken cognisance of on 13 January 1988). The fact that the payments were stopped only on 1 March 1988 it "would therefore appear that the company had actually entered into a fresh contract with the employees, after signing the collective agreement with the union, to continue to pay these two allowances".

Secondly, he opined:

> It could not have been the intention of the law or the parties to the collective agreement that employees should lose benefits under a contract simply because a collective agreement has been entered into. The intention of collective bargaining is for the union to obtain better benefits for its members and in this case since the question of Special Relief Allowance and Incentive Allowance were never discussed by the union and management seems to indicate that it was the intention of both parties that these two payments should continue.

With respect I disagree with such a view. At the outset, it is to be noted that the two grounds that he gave appear to be inconsistent with one another. In his first ground he concluded that there was a fresh contract between the appellant and the employees arising from the fact that the appellant had continued making the payments in respect of the two allowances. In his second ground, however, he appears to suggest that the provisions of the original contracts providing for SRA and IA continued to be in force despite the coming into force of the CA.

As for the view that I hold, to begin with, s. 17(2) of the IRA provides:

> 17. (2) As from such date and for such period as may be specified in the collective agreement it shall be an implied term of the contract between the workmen and employers bound by the agreement that the rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the agreement unless varied by a subsequent agreement or a decision of the Court.

Art 13(b) of the CA provides:

> 13(b) As from such date and from such period as may be specified in the Collective Agreement, it shall be the implied terms of the contract between the employee and the employer bound by this Agreement that the rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with this agreement unless varied by a subsequent Agreement.

In my view, what the section (and equally the Article) stipulates is that, after the coming into force of the CA, the provisions of the contract of service relating to the rates of wages to be paid and the conditions of employment to be observed should be in accordance with the provisions of the CA.

What if the provisions of the original contract of service are in conflict with the CA? The answer is provided for by Art. 13(a) of the CA which states:

> 13(a) Where any clause in any current contract of service exists which is in conflict with the terms of this Agreement, then such clause shall be superseded by the relevant terms of this agreement.

In the present case, as has been said earlier, the original contract of service provides for SRA and IA. Also as has been said earlier, the CA provides for rates of wages and conditions of employment but is silent on the question of SRA and IA: Now, based on these facts, learned Counsel for the appellant, before me, submits that there is a conflict between the provisions of the original contract relating to SRA and IA and the provisions of the CA relating to conditions of employment. Learned Counsel for the respondent, on the other hand, argues that since the CA does not touch on the SRA and the IA, therefore, the provisions of the original contract of service relating to such allowances are still in force. In other words, the provisions relating to SRA and IA in the original contract of service and the provisions relating to conditions of employment in the CA co-exist.

In my opinion, the provisions of the original contract of service relating to SRA and IA are in essence provisions governing conditions of employment. The effect of s. 17(2) of the IRA and Art 13 (b) of the CA requires the provisions of the contract of service pertaining to conditions of employment to conform (that is, to be in accordance) with the provisions of the CA pertaining to the same matters. If the CA does not provide for SRA and IA but the original contract of service does provide for the same can we say that the conditions of employment in the original contract of service are in accordance with the conditions of employment in the CA? In my view the answer must be in the negative. To my mind here is a situation where the provisions relating to SRA and IA in the original contract of service and the provisions relating to conditions of employment in the CA are in conflict. The phrase "to be observed" in s. 17(2) of the Industrial Relations Act and Art. 13 (b) of the CA impose an obligation on both sides: it does not only impose an obligation on the company to honour every term and condition stipulated in the CA but it also imposes an obligation on the Union or employees not to demand for more that is to say not to demand from the company anything which is not provided for in the CA. Hence as stipulated by Art. 13(a) of the CA parties to the original contract of service must regard the provisions in the original contract of service relating to SRA and IA as having been superseded by the provisions relating to conditions of employment in the CA.

Of course, in the present case if the parties at the time of drafting the CA had wished to continue with the SRA and IA payments and to retain the provisions relating to SRA and IA in the original contract they could legally have done so. There was nothing to prohibit them from doing so. But it should have been clearly provided for in the CA, perhaps by way of a saving provision. But in the present case there is no such indication either by way of a saving provision or otherwise in the CA. Indeed since the CA deals with conditions of employment in what appears to me a detailed and comprehensive manner, it would be rather odd and an unsatisfactory way of doing things if, assuming that the parties at the time of drafting the CA were desirous of retaining the SRA and IA yet provisions relating to such matters were not incorporated in the CA but were left to remain in the original contract of service.

Also it is conceded that there was nothing to prevent, the appellant soon after the signing of the CA, to carry on making the SRA and IA payments either as gratuitous payments or as a matter of a fresh contractual obligation (as opposed to a continuing contractual obligation). Yet if it was the intention of the parties to provide for SRA and IA **as a matter of fresh contractual obligation** after the signing of the CA then, as required by s. 17(2) of the Industrial Relations Act and Article 13(b) of the CA, the parties should have varied the CA by a "subsequent agreement". "Subsequent agreement" here means a subsequent collective agreement which satisfies all the requirement of Part IV of the Industrial Relations Act and Article 2(b), (c) and (d) of the CA. Article 2 (b), (c) and (d) of the CA reads:

> Article 2(b) During the period of this agreement neither the Company nor the Union shall seek to vary any of its terms nor shall any demands or claims be made on new terms and conditions of employment save by mutual agreement, by operation of law

or as provided herein and provided that such variation shall take effect and be binding on the parties only after being given cognisance by the Industrial Court.

(c) Any variation to the terms of this Agreement shall be jointly deposited by both parties with the Industrial Court for its cognisance within one month from the date of the agreement of the said variation.

(d) Either party may serve on the other three months' written notice to negotiate on new terms and conditions of employment and other related matters but no such notice shall be served earlier than 1 June 1990. The party that serves the notice shall also submit proposals on terms and conditions of employment for negotiation. In the event of deadlock in negotiation, the provisions of the current terms and conditions of employment shall prevail until superseded by new terms concluded between the parties or awarded by the Industrial Court.

In the case before me there is clearly no evidence of any subsequent collective agreement. Indeed, there appears to be not even evidence of a negotiation at all. Surely, the mere act of the appellant in continuing making SRA and IA payments after 13 January 1987, cannot be described as evidence of a subsequent collective agreement which satisfied all the requirements of Part IV of the Industrial Relations Act as well as Article 2(b), (c) and (d) of the CA. Such payments appear to me to be nothing but mere gratuitous payments. As explained by learned Counsel for the appellant, the payments of the two allowances were continued pending the implementation of the new and better scheme under the CA. He went on to explain that the CA could not be implemented immediately after the signing of the CA because the parties had to obtain the cognisance of the Industrial Court first, and thereafter, the appellant needed about a month to work out the conversion from the old scheme to the new scheme; and that was why the SRA and the IA ceased to be paid only with effect from 1 March 1988.

Accordingly, I allow this appeal with costs. The order of the Labour Officer, Port Klang, is set aside. The deposit made by the appellant to be refunded.

**PLENITUDE HOLDINGS SDN. BHD.**

**v.**

**TAN SRI KHOO TECK PUAT AND ANOR.**

HIGH COURT, JOHOR BAHRU
DATO' P.S. GILL J.
[CIVIL SUIT NO. 22-32-89]
10 MAY 1993

***JURISDICTION: Principle of res judicata and functus officio - Judgment of High Court affirmed by Supreme Court - Whether trial Judge has jurisdiction to alter and vary judgment regularly obtained, drawn up, perfected and affirmed by Supreme Court.***

At the High Court, Johor Bahru, the plaintiff obtained an order for specific performance against the 2nd defendant of the sale and purchase agreement dated 20 August 1984 in respect of a piece of Estate land at a price of RM47,939,958. In fact, previously, the second defendant had terminated the said agreement and forfeited the deposit of RM4,793,995.80 on the ground that the plaintiff had failed to pay the balance sum within the stipulated period of the said agreement, or within the extended completion period. (See [1992] 4 CLJ 1882).

The second defendant appealed against the judgment of the High Court and the Supreme Court dismissed the appeal and affirmed the judgment. (See [1993] 2 CLJ 146). Subsequently, the plaintiff paid the sum of RM43,145,962.20 being the balance of the purchase price to the 2nd defendant and obtained a valid and legal title to the said land.

On 17 February 1993 the 2nd defendant filed an application at the High Court, Johor Bharu, seeking an order that the plaintiff should pay to the second defendant in addition to the balance of the purchase price of RM43,145,962 a further sum as liquidated damages calculated at RM11,000 per day as expressly provided for in clause 3.4 of the said agreement from 21 May 1985 to the date of actual payment.

**Held:**

**[1]** The second defendant has offered no satisfactory explanation why the issue of liquidated damages relating to clause 3.4 of the